

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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race- and gender-based benefits contained in the rules. Simultaneously, the Commission would extend to *all* small businesses (including those owned by minorities and women) the maximum level of bidding discounts and favorable installment payment terms now reserved exclusively for minority and female controlled firms under the rules. For the reasons set forth herein, Jackmont agrees that circumstances appear to compel the Commission to eliminate race-and gender-based preferences contained in the "C" Block competitive bidding rules if the auction is to go forward on a reasonably timely basis. However, Jackmont also urges the Commission to begin now to develop the necessary record to support, in future spectrum auctions, provisions that will in fact significantly increase opportunities for minority ownership in the wireless communications sector.

Section 309(j) of the Communications Act instructs the Commission, when it issues licenses on a competitive bidding basis, to disseminate the licenses among, and provide economic opportunity for, "a wide variety of applicants including small businesses, rural telephone companies and businesses owned by members of minority groups and women."<sup>3</sup> Jackmont believes that the existing "C" Block rules fairly implement these requirements of Section 309(j). However, the race- and gender-based affirmative action provisions included in the existing rules were adopted without the benefit of the Supreme Court's decision in *Adarand*. That decision establishes a new standard, for the first time requiring that even congressionally mandated affirmative action programs be validated under a "strict scrutiny" test for consistency with the equal protection element of the Fifth Amendment. While

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<sup>3</sup> Communications Act, §§ 309(j)(3)(B), 309(j)(4)(B).

Jackmont believes that the Commission's existing rules can be justified under a strict scrutiny standard, it seems clear that any effort to provide such a justification will lead to prolonged litigation, and quite possibly to a stay of the "C" Block auction itself. If Jackmont's situation is typical, and we believe it is, such a stay would severely disadvantage most small business firms (including minority owned firms) planning to bid in the auction.

When the Commission delayed the Form 175 filing date for the "C" Block auction in the wake of *Adarand*, Jackmont was in the final stages of forming a partnership in which it would be general partner and which was assured sufficient financing to bid on, acquire and exploit broadband PCS licenses. These arrangements are now in abeyance, and Jackmont believes that the proposed partnership arrangement may never be finalized if there are further significant delays prior to commencement of the "C" Block auction. For this reason, Jackmont joins with other minority controlled potential bidders who have urged the Commission to proceed with the auction essentially on the basis that is now proposed.<sup>4</sup>

Additionally, on June 23, 1995, the Commission issued licenses to the winning bidders in the "A" and "B" Block broadband PCS auctions conducted earlier this year. All of these licensees are very large telecommunications firms. Each day that the "C" Block auction is delayed simply increases the very substantial advantage that these large, integrated telecommunications companies already possess in the marketplace. Thus, the widening

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<sup>4</sup> See, e.g., Informal Comments of Michael Walker, Executive Director, National Paging and Communications Association, filed June 16, 1995.

headstart that the "A" and "B" Block licensees now enjoy adds even greater urgency to the need to move forward expeditiously with the "C" Block auction.

While the Commission should eliminate race- and gender-based preferences from the rules governing the "C" Block auction, however, no similar justification exists for a generalized retreat from the requirements of Section 309(j) of the Communications Act. Jackmont urges the Commission to begin now to adopt a record to support, under the *Adarand* standard, rules that will in fact significantly increase opportunities for minority ownership in wireless communications services, as in other communications services. This, after all, is the specific mandate of Section 309(j). It is only in light of the tortured history of this proceeding that the latest proposed rule changes, limited to the "C" Block auction, may be viewed as carrying out the requirements of the statute.

Respectfully submitted,

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